Nos. 10-1687, 10-2442

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD VANCE, ET AL.,

Plaintiffs-Appellees,

v.

DONALD RUMSFELD and THE UNITED STATES OF AMERICA,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, HON. WAYNE R. ANDERSEN

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY

1. Plaintiffs approach this case as if it were merely a garden variety tort action against a government official. However, in the 39 years since *Bivens*[1] was decided, no court has extended that decision to create a common law cause of action for damages against military officials for policies related to military actions in a foreign

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[1] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

war zone. Indeed, every court to confront a *Bivens* challenge to military detention abroad (save for the district court here) has emphatically rejected creating such actions, in light of the sensitive military and national security concerns inevitably involved in litigating them. *See Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.), *cert. denied,* 130 S. Ct. 1013 (2009); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111-12 (D.D.C. 2010), *appeal pending*, No. 10-5393 (D.C. Cir.); *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 94 (D.D.C. 2007), *appeal pending*, No. 07-5186 (D.C. Cir.).

There is no question that torture is illegal and that the government has repudiated it in the strongest terms. But this case does not turn upon that question. Rather, this case turns upon the fundamental limits on courts' authority to create causes of action for monetary damages in new, sensitive contexts, without congressional approval, particularly in a case against the former Secretary of Defense challenging alleged policies concerning wartime detention in a foreign war zone.

Plaintiffs' argument to the contrary begins with the incorrect premise that the existence of a *Bivens* claim is the default rule, and that such a claim must be permitted in the absence of some affirmative disavowal of a remedy by Congress. But the case law says precisely the opposite. The fact that Congress has chosen *not* to provide for a cause of action is a strong reason for the courts not to create one.

Plaintiffs also make the astonishing claim that their action against the former Secretary of Defense concerning alleged military detention policies does not implicate military decision-making because Congress had already made the "war policy decisions" regarding military detention. However, merely alleging that a military policy conflicts with a congressional mandate does not change the fact that this action would require direct judicial intrusion into military and national security matters. Plaintiffs' argument would set up the courts as the ultimate arbiters of U.S. military or foreign policy, deciding which actions are "consistent" with U.S. policy (and therefore not subject to *Bivens* actions), and which are not.

2. Plaintiffs' efforts to rebut Secretary Rumsfeld's entitlement to qualified immunity fare no better. Plaintiffs cannot overcome the fact that the complaint does not sufficiently allege that Secretary Rumsfeld was personally involved in the alleged constitutional violation. While the complaint contains allegations of previous detention and interrogation policies, those policies were superseded by explicit congressional action. Plaintiffs' claim therefore is dependent upon the speculative and implausible allegation that Secretary Rumsfeld adopted a classified addition to the Army Field Manual containing policies directly contrary to statute. Despite asserting that this claim is "plausible," plaintiffs admit elsewhere in their brief that there is in fact no such classified addition to the manual.

Plaintiffs then seek to recast their complaint as alleging that notwithstanding the direction of Congress, Secretary Rumsfeld refused to rescind alleged policies that existed prior to the statute (and prior to their detention), and took affirmative steps to continue using the tactics authorized by those policies. The complaint, however, contains no such allegations.

3. Nor can plaintiffs overcome the fact that their claim under the Administrative Procedure Act (APA) does not survive the Act's "military authority" exception, 5 U.S.C. § 701(b)(1)(G). Accepting the premise that challenging the seizure of their property by military officials in a foreign war zone would fall within the exception, plaintiffs assert that they are merely challenging a decision not to return their property. But plaintiffs never address the fundamental flaw in this line of reasoning: focusing on the supposed failure to return the property will not, as plaintiffs assert, negate the need to inquire into the exercise of military authority in time of war. A court will inevitably have to inquire into the circumstances of the seizure of property, where and how it was stored, to whom it was transferred, and whether military officials lost or misplaced it. Indeed, if plaintiffs were correct, any litigant could, simply through artful pleading, negate the military authority exception and require extensive discovery into the chain of custody of property seized by military officials in a combat zone in time of war.

ARGUMENT

I. A COURT SHOULD NOT, WITHOUT CONGRESSIONAL AUTHORIZATION, CREATE A *BIVENS* DAMAGE REMEDY IN THIS CONTEXT, WHICH DIRECTLY IMPLICATES MATTERS OF NATIONAL SECURITY AND WAR POWERS.

As we demonstrated in our opening brief, the context of this case presents compelling "special factors" that strongly counsel against judicial creation of a money-damage remedy without congressional authorization. Plaintiffs ask this Court to recognize a judicially-created damage action to adjudicate their claim – a claim that stems from their detention in a foreign war zone and involves an explicit challenge to alleged detention and interrogation policies issued by the Secretary of Defense. The claim plaintiffs seek to present cannot proceed without inquiry into the military's detention and interrogation policies that applied in an active foreign war zone. Even outside the context of implied rights of action, courts are reluctant to second-guess military decisions or intrude into the execution of military policies. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981); *Alhassan v. Hagee*, 424 F.3d 518, 525 (7th Cir. 2005). "Unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). Where, as here, Congress has not provided for judicial review, the potential for interference

with military and national security matters compels the conclusion that the creation of a damages action by the judiciary in this context would be inappropriate. *See United States v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 301-304 (1983); *Rasul*, 563 F.3d at 532 n.5; *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985).

Plaintiffs nonetheless insist that provision of a court-created damages remedy in this case would not interfere with military or national security matters, and is nothing more than a straightforward and routine application of *Bivens*. This argument fails to come to grips with the overwhelming weight of the case law disfavoring the extension of judicially-created common law damages remedies in sensitive military, national security and foreign policy contexts, and specifically disapproving of such actions in the context of military action in a foreign war zone.

1. Plaintiffs begin with the incorrect premise that the existence of a *Bivens* claim is the default rule; that is, that a *Bivens* claim must be permitted in the absence of some affirmative disavowal of a remedy by Congress. But the case law says precisely the opposite. As the Supreme Court has explained, its "more recent decisions have responded cautiously to suggestions that Bivens remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). "Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens*

liability 'to any new context or new category of defendants.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001)).

Contrary to plaintiffs' assertion (Br. 20), these passages are not "out-of-context snippets of disparate cases," but a reflection of the Supreme Court's longstanding and consistent reluctance to create new constitutional tort actions that are not authorized by statute. *See Malesko*, 534 U.S. at 67 n.3. "The [Supreme] Court has focused increased scrutiny on whether Congress intended the courts to devise a new *Bivens* remedy, and in every decision since *Carlson*, across a variety of factual and legal contexts, the answer has been 'no.'" *Western Radio Servs. Co. v. U.S. Forest Service*, 578 F.3d 1116, 1119 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2402 (2010). Thus, "in the 38 years since *Bivens*, the Supreme Court has extended it twice only . . . ." *Arar v. Ashcroft*, 585 F.3d 559, 574-75 (2d Cir.2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010); *see also Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (explaining the Court's recent decisions establish a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees").

2. The extension of *Bivens* to create a common law right of action to challenge military detention policy in an active foreign war zone is not, as plaintiffs argue, a

"straightforward application" of *Bivens* (Pl. Br. 15). As noted, no court has ever recognized such a judicially-created damage action arising out of a foreign war zone. Plaintiff's assertion (Pl. Br. 21) that general claims of substantive due process and supervisory liability are not new is of no moment. The same was true in *Wilkie v. Robbins*, 551 U.S. 537 (2007), which involved well-recognized Fourth and Fifth Amendment claims. It is the extension of a *Bivens* action to a new *context* that warrants careful review, and the context here, involving the review of military judgments concerning the detention of suspects in a foreign war zone, clearly counsels hesitation. *See FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1994) ("a *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others"); *Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009) ("*Bivens* actions are not recognized Amendment by Amendment in a wholesale fashion" but instead are "context-specific").

Thus, the fact that a *Bivens* claim has been fashioned in certain circumstances, or that the Supreme Court has "heard" over a dozen *Bivens* cases in 39 years (Pl. Br. 21-22), says nothing about the propriety of extending a judicially-created cause of action to new and sensitive contexts without congressional approval, particularly to challenge military detention policy in a foreign war zone. Indeed, the bulk of the

cases cited by plaintiffs did not address "special factors" at all, and none involved military matters, let alone detention policies in an active zone of armed conflict.

3. Plaintiffs next attempt to show that there is no *per se* rule prohibiting *Bivens* cases involving the military. But despite plaintiffs' claim to the contrary (Pl. Br. 22), we have never argued that anything "touching upon the military" is *per se* barred by *Bivens*. What the special factors doctrine addresses is the reluctance to endorse judicially-created damage actions that implicate sensitive areas. If a damage remedy is to be afforded in such areas, it should come from the legislative branch, which "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562; (*quoting Bush v. Lucas*, 462 U.S. 367, 389 (1983)). This case involves such a sensitive context. Plaintiffs' claim arose in a foreign war zone and challenge policies and actions allegedly taken by the military in that war zone.

Thus, plaintiffs' contention that courts "routinely" allow *Bivens* claims against military officials (Pl. Br. 22-23) is both incorrect and beside the point. None of the cases plaintiffs cite involved review of military action; none involved a challenge to military policy; and none involved a challenge to such action or policy in a foreign war zone. Indeed, a glance at the cases cited by plaintiffs underscores how different those garden-variety domestic claims are from the action plaintiffs seek to maintain

here. *Case v. Milewski*, 327 F.3d 564 (7th Cir. 2003), for example, involved a dispute at a golf course located on a Naval Base in Illinois, and this Court held that the *Bivens* claim was properly dismissed as a result of the plaintiff's guilty plea to resisting arrest. *Fields v. Blake*, 349 F. Supp. 2d 910, 914 (E.D. Pa. 2004), was an action brought after military officials reported an individual to local police after a dispute over unpaid bills for lodging and dining at an Air Force base in Pennsylvania. And *Willson v. Cagle*, 711 F. Supp. 1521 (N.D. Cal. 1988), *aff'd*, 900 F.2d 263 (9th Cir. 1990) – the only case cited by plaintiffs that even addressed the "special factors" analysis – held that a claim by a protestor injured while seeking to block a munitions train in California could go forward. None of these cases even come close to a claim such as this one, which seeks to review the propriety of alleged detention policies in a foreign war zone.[2]

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[2] The remaining cases cited by plaintiffs are equally inapposite. *See Roman v. Townsend*, 224 F.3d 24 (1st Cir. 2000) (claim arising from arrest for entering Army base without a valid driver's license dismissed as untimely); *Applewhite v. U.S. Air Force*, 995 F.2d 997 (10th Cir. 1993) (claim arising from drug "sting" operation that resulted in arrest of Airman and his wife dismissed for failure to state a claim); *Morgan v. United States*, 323 F.3d 776 (9th Cir. 2003) (action by civilian air traffic controller at Air Force base challenging suspicionless search of vehicle at entry gate); *Barrett v. United States*, 622 F. Supp. 574 (S.D.N.Y. 1985) (holding that the amendment of a complaint to include government officials who allegedly covered up a medical testing program was not barred by the statute of limitations), *aff'd*, 798 F.2d 565 (2d Cir. 1986). *Degrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980), was not a *Bivens* case at all, but an action under Title VII of the Civil Rights Act brought by a discharged civilian employee at a naval air station.

Indeed, it is telling that, when plaintiffs argue that the courts are competent to review military actions and policies, they rely not upon cases that permit *Bivens* claims, but upon cases addressing writs of habeas corpus. *See* (Pl. Br. 16-18); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Munaf v. Geren*, 553 U.S. 674 (2008); *Ex parte Quirin*, 317 U.S. 1, 19 (1942). Habeas is a remedy for release from government custody, explicitly authorized by statute *and* by the Constitution. *See* U.S. Const., Art. I, § 9, cl. 2; 28 U.S.C. § 2241. *Bivens*, by contrast, is a judicially-created damages remedy against individual federal officers, with a presumption against creating new claims or applying claims in new contexts. *See Malesko*, 534 U.S. at 67 & n.3 (the Supreme Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Chilicky*, 487 U.S. at 423.

To the extent plaintiffs suggest that *Trop v. Dulles*, 356 U.S. 86 (1958), authorizes review of "punishment for wartime desertion" (Pl. Br. 17), they are mistaken. In that case, the plaintiff sued after he was denied a passport due to his previous dishonorable discharge from the Army for wartime desertion. The case did not involve review of the discipline he received from the military, but of a statute withdrawing citizenship for anyone guilty of desertion. That case plainly has no bearing upon the propriety of creating a *Bivens* remedy to review military detention policies in a war zone during a time of active conflict.

3. Plaintiffs also contend (Pl. Br. 29-30) that their right to maintain a *Bivens* action is supported by the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005). This contention is based upon both a misreading of the Act and a misunderstanding of *Bivens*.

First, plaintiffs are incorrect when they state (Pl. Br. 29) that Congress "preserved" civil claims against military officers in the DTA. Plaintiffs' interpretation is dependent upon omitting the final sentence from the section they quote. Thus, section 1004(a) of the DTA provides that, in any civil or criminal action against a government officer for actions that involve "detention and interrogation of aliens" whom the President or his designees have determined to be involved in terrorist activity, "it shall be a defense that such officer . . . did not know the practices were unlawful." 42 U.S.C. § 2000dd-1(a). But the section goes on to state: "Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities." *Id*.

By its plain language, the DTA therefore did not "draw a line between permissible and impermissible claims" alleging detainee treatment (Pl. Br. 29). It simply provided a degree of immunity to officers for any claims (including criminal

prosecutions) *in addition to* whatever immunity those officers already enjoyed. The notion that Congress intended a narrow grant of immunity to permit *Bivens* actions against military officials therefore is without foundation. Plaintiffs cite no statutory language or legislative history to suggest that Congress intended to authorize a *Bivens* remedy for military detention when it enacted the DTA. Indeed, the question of immunity is entirely separate from the question whether special factors preclude a *Bivens* action. *See Stanley*, 483 U.S. at 684. Congressional action on immunity thus does not suggest that Congress somehow intended to sanction actions for money damages against individual military officials for overseas wartime detention policies or practices.

Second, plaintiffs' underlying premise – that the failure of Congress to prohibit *Bivens* actions means they must be permitted – is wrong. Plaintiffs get it exactly backward. The fact that Congress did not *prohibit* suits does nothing to show that the court should create a non-statutory *Bivens* remedy. To the contrary, the fact that Congress has legislated in the area of detainee treatment but chosen *not* to provide a cause of action is a strong reason for the courts not to create one. *Malesko*, 534 U.S. at 67 & n.3 (stating the Supreme Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Chilicky*, 487 U.S. at 423; *Arar*, 585 F.3d at 581 ("if Congress wishes to create a remedy for individuals

* * *, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded"). Simply stated, the "mere fact that Congress has not expressly barred a cause of action does not suggest that inferring a judicially created one is warranted, or even appropriate." *In re Iraq*, 479 F. Supp. 2d at 107 n.23.[3]

Nor does the fact that plaintiffs may find themselves without a damages remedy mean that the courts must create a *Bivens* action. *See Stanley*, 483 U.S. at 683 ("it is irrelevant to a special factors analysis whether the laws currently on the books afford Stanley * * * an adequate federal remedy for his injuries"). The fact that there is no *Bivens* remedy "does not leave the executive power unbounded" because "[i]f the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005). Indeed,

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[3] In addition to the DTA, Congress has passed other legislation in recent years regarding detainee treatment, and none of these statutes provide detainees with a cause of action or otherwise involve the Judiciary in their enforcement. *See* Ronald W. Reagan Nat'l Def. Authorization for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2069-70 (codified at 10 U.S.C. § 801, stat. note §§ 1091-92); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635 (codified at 28 U.S.C. § 2241(e)). This "frequent and intense" congressional attention to the issue of detainee treatment is further confirmation that judicial intervention in this area is inappropriate, particularly where, as here, Congress has not authorized the remedy that plaintiffs seek. *Chilicky*, 487 U.S. at 425-26.

Congress has addressed the issue of detention standards in both civil and criminal statutes. *See* 10 U.S.C. §§ 892, 893, 928; 18 U.S.C. § 2340A. The fact that Congress addressed the problem without providing for damages actions against government officials counsels against judicial intervention to create such actions.

4. Plaintiffs brought this action against the Secretary of Defense. Their complaint specifically alleges that their alleged mistreatment was used "for its perceived value as an interrogation tactic," and that their treatment was "pursuant to and in accordance with" policies issued by the Secretary of Defense. App. 126, ¶¶ 261-62; *see also* App. 124, ¶ 252 (alleging that "this conduct was being carried out pursuant to the interrogation and detention policies Mr. Rumsfeld himself created and implemented").

Notwithstanding the specific allegations in their complaint, plaintiffs make the astonishing claim that they "do not challenge the military's detention policies in Iraq." Pl. Br. 27. According to plaintiffs, because Congress and the President declared abusive tactics unlawful, their *Bivens* claim may proceed because the tactics alleged here violated "U.S. policy." According to plaintiffs, this case does not involve any concerns about military decision-making or "the Executive's prerogative on national Security" (Pl. Br. 27), because "Congress had already made the war policy decisions" relevant to this case when the alleged tactics were used (Pl. Br. 28-29).

Plaintiffs' argument is untenable. The special factors inquiry turns upon the prospect of judicial intrusion into military and national security matters. Merely alleging that a particular military action is inconsistent with a statute or with the orders of the President would not alleviate these concerns. In fact, it would exacerbate them. Plaintiffs would have the courts not only delving into sensitive national security matters, but also determining whether particular military decisions are consistent with acts of Congress or presidential orders. Plaintiffs' argument would set up the courts as the ultimate arbiters of U.S. military or foreign policy – deciding whether particular actions are "consistent" with U.S. policy (and therefore not subject to *Bivens* actions), and which are not consistent with U.S. policy.

Under plaintiffs' approach, any military action could potentially result in a *Bivens* claim as long as it is characterized as a violation of some alternative government policy. For instance, if a litigant believes that a particular military action (say, for example, an air strike in a particular region) exceeds the bounds of congressional authorization to wage war, the litigant may be able to seek damages against the Secretary of Defense, or a general in the field, for acting contrary to "U.S. policy" as declared by Congress.

Not surprisingly, no court has adopted this approach. In fact, the plaintiffs in *Rasul* unsuccessfully made the same argument, asserting that the interrogation

techniques challenged there were inconsistent with established U.S. policy. In her initial concurring opinion (approved by the majority in the later *Rasul* opinion), Judge Brown explained that this argument does not alter the special factors analysis, given the potential consequences of recognizing a damage action in this context. *Rasul v. Myers*, 512 F.3d 644, 673 (D.C. Cir.) (Brown, J, concurring in part and dissenting in part), *vacated on other grounds*, 129 S. Ct. 763 (2008). Moreover, a similar claim was made and rejected in *In re Iraq*. 479 F. Supp. 2d at 104-05 n.21 (rejecting claim that, because the defendants had no discretion under military law to engage in abuse, a *Bivens* claim would not implicate military affairs or national security issues). Plaintiffs' argument likewise should be rejected.

5. As we demonstrated in our opening brief, the case law overwhelmingly establishes that new *Bivens* actions are disfavored, that such actions should not be permitted where doing so would interfere with military and national security matters, and that *Bivens* claims are particularly inappropriate in cases seeking to challenge alleged military policies on overseas detention in a war zone. Plaintiffs attempt to distinguish a number of these cases, pointing to specific differences between each case and the particular circumstances alleged here.

However, the distinctions upon which plaintiffs rely do nothing to diminish the weight of authority establishing that a *Bivens* action should not be extended to this

context. For instance, while in some cases the intrusion into military policies was informed by the fact that the plaintiffs were military personnel (*see* Pl. Br. 24-25), the driving force behind those decisions is the same as it is here: "the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate" in the *Bivens* context. *Stanley*, 483 U.S. at 683. As courts have recognized, that overriding principle applies to *Bivens* claims implicating military detention policies overseas. *See Rasul*, 563 F.3d at 532 n.5; *In re Iraq*, 479 F. Supp. 2d at 107.

The same holds true if the disruption occurs at the behest of a U.S. citizen. Citizenship may be relevant to determining the extent and nature of a person's underlying constitutional rights, and a litigant's status as an alien can be relevant in some circumstances to evaluating the foreign policy implications of a particular claim. But citizenship does not in and of itself diminish the potential for intrusion into U.S. military affairs from a lawsuit challenging military wartime detention policy in a foreign combat zone. *Cf. Sanchez-Espinoza*, 770 F.2d at 208.

II. FORMER SECRETARY RUMSFELD IS ENTITLED TO QUALIFIED IMMUNITY.

Because special factors clearly preclude a *Bivens* claim here, this Court need not address whether Secretary Rumsfeld is entitled to qualified immunity. As we

explain in our opening brief, however, the district court should also have dismissed the case because Secretary Rumsfeld is entitled to qualified immunity.

1. As detailed in our opening brief (at 42-45), the complaint does not sufficiently allege that Secretary Rumsfeld was personally involved in the alleged constitutional violation. While plaintiffs' complaint contains allegations of previous detention and interrogation policies, those policies were superseded by explicit congressional action. Plaintiffs' claim therefore is dependent upon the notion that Secretary Rumsfeld secretly violated an express congressional command. As we explained in our opening brief (44-45), that claim is based upon the speculative and implausible allegation that Secretary Rumsfeld adopted a classified addition to the Army Field Manual containing policies directly contrary to statute, and is precisely the sort of "naked assertion" of illegal conduct, without any factual enhancement, that is insufficient to state a claim for personal liability against a government official. *Iqbal*, 129 S. Ct. at 1947.

Plaintiffs assert that, while our opening brief calls the allegation regarding the classified addition to the field manual speculation, "tellingly" we did "not deny it" (Pl. Bt. 9-10). That is simply false. In our opening brief, we made quite clear that this allegation has no truth to it. *See* Opening Br., at 45 ("To the contrary, the only update of the Field Manual since September 1992 was in September 2006, and no part of

either of these versions is classified. Both the 1992 and 2006 Field Manuals are matters of public record"); *see also id*. at 29 n.2 ("In actuality, no part of the Army Field Manual is classified").

Plaintiffs attempt to bolster their specious claim by citing (for the first time in this litigation) a 2005 newspaper article referring to a classified addendum to the Army Field Manual. Pl. Br. 10 (citing Eric Schmitt, *New Army Rules May Snarl Talks With McCain on Detainee Issue*, N.Y. Times, Dec. 14, 2005). But even that article stated only that the Army forwarded a classified set of interrogation methods for higher approval – not that it had been approved by Secretary Rumsfeld or adopted in any way. In fact, elsewhere in their brief plaintiffs state that "Defendant gave up on his efforts to classify the Field Manual." Pl. Br. 36-37.

This admission undermines the heart of plaintiffs' claim. Plaintiffs specifically alleged in their complaint that "the December Field Manual was in operation during their detention," and that this is the document that (secretly, according to plaintiffs) "authorized, condoned, and directed the very sort of violations that Plaintiffs suffered." App. 121-22 ¶ 244. It is difficult to see how plaintiffs, having admitted that the Field Manual was not in fact classified, can nevertheless persist in their contention that "the classification allegations are plausible" (Pl. Br. 46).

Lacking a plausible claim that Secretary Rumsfeld added a classified addendum to the Army Field Manual with policies directly contrary to the express mandate of the DTA, plaintiffs seek to rely upon alleged policies that existed prior to the statute (and prior to their detention). They take issue with our contention that these earlier policies were "superseded," arguing that this reflects a misunderstanding of their complaint (Pl. Br. 45). But plaintiffs miss the point. As their own complaint makes clear (App. 121), all of these supposed policies were superseded *by statute*. As a result, plaintiffs' claim against Secretary Rumsfeld cannot succeed absent a non-conclusory, plausible allegation that the Secretary of Defense deliberately violated the congressional command in the DTA.

Plaintiffs therefore now seek to recast their complaint as alleging that notwithstanding the direction of Congress, Secretary Rumsfeld refused to rescind his previous policies and "took affirmative steps to continue the use of the tactics." *See, e.g.,* Pl. Br. 44-45. But the complaint alleges no such thing.

The complaint alleges that Secretary Rumsfeld established an interrogation policy covering Guantanamo in 2002, rescinded that policy in 2003, and established another policy governing Guantanamo in 2003. App. 118-19 ¶¶232-34. Plaintiffs attempt to make those policies relevant by alleging that Secretary Rumsfeld sent Major General Geoffrey Miller to Iraq in August 2003 to "gitmo-ize" Camp Cropper.

App. 119, ¶ 236. However, while plaintiff's *brief* asserts that Secretary Rumsfeld affirmatively approved of the transfer of Guantanamo interrogation tactics to Iraq (Pl. Br. 47), the best the complaint can do is allege that Secretary Rumsfeld "*tacitly* authorized Major [General] Miller" to apply Guantanamo tactics in Iraq. App. 119, ¶ 237 (emphasis added).

The complaint then cites a September 2003 memorandum signed not by Secretary Rumsfeld, but by Lieutenant General Ricardo Sanchez. App. 119-20, ¶ 238. The complaint contains the conclusory allegation that Secretary Rumsfeld "directed, approved and sanctioned" General Sanchez in issuing this memorandum (which plaintiffs now call the "Iraq list"). *Id*. Significantly, however, the complaint acknowledges that "Commander Sanchez modified the previous authorization" one month later, continuing to allow certain interrogation techniques. App. 120, ¶ 239. At no point does the complaint allege that Secretary Rumsfeld was involved in the issuance of the new directive issued by General Sanchez.

More important, however, the complaint does not allege that Secretary Rumsfeld made an affirmative decision to keep these policies in place after Congress enacted the DTA.[4] The only allegations in the complaint even suggesting a post-DTA

[4] Notably, plaintiffs' repeated statements that Secretary Rumsfeld "refus[ed] to rescind" his previous policies are accompanied not by specific citations, but by references to a broad range of paragraphs in the complaint. *See, e.g.,* Pl. Br. 7, 45.

decision make no mention of these previous policies at all. The complaint alleges that "[n]umerous instances of abuse occurring *since Defendant Rumsfeld changed the Field Manual in December 2005*, including Plaintiffs' experiences and those documented by UNAMI, make clear that Mr. Rumsfeld did not take measures to conform the interrogation techniques to Congress's command." App. 122, ¶ 235 (emphasis added). The complaint also alleges that Secretary Rumsfeld "took no steps to investigate and correct the abuses" because "this conduct was being carried out pursuant to the interrogation and detention policies Mr. Rumsfeld himself created and implemented." App. 123-24, ¶ 252.

Plaintiffs' allegations thus boil down to an assertion that Secretary Rumsfeld did not take sufficient measures to end "abuses" by subordinate officers. That is precisely the sort of mere "knowledge and acquiescence" theory that does not survive *Iqbal*. That case makes clear that government officials may not be held responsible for the misconduct of their subordinates under broad theories of "supervisory liability." *Iqbal*, 129 S. Ct. at 1949. Instead, a supervisory official may be held liable under Bivens only if a respondent demonstrates that the supervisor "through [his or her] own individual actions, has violated the Constitution." *Id*. at 1948.

The fact that plaintiffs' due process claim is governed by the "deliberate indifference" standard does not change the result. Plaintiffs must do more than allege

generally that abuses against other detainees were occurring in order to make out a claim against Secretary Rumsfeld for deliberate indifference to their treatment. While the Court in *Iqbal* recognized that the "factors necessary to establish a *Bivens* violation" by a supervisory official "will vary with the constitutional provision at issue," the Court also noted that traditional concepts of supervisory liability may sit in tension with the theory of *Bivens* liability. *See id.* ("in the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities"). Plaintiffs fail to allege facts that could show, not merely passive "knowledge and acquiescence" on the part of Secretary Rumsfeld, *id*., but the kind of active and intentional disregard for their treatment that would be necessary to establish liability for substantive due process violations by a defendant alleged to have directly perpetrated those violations. Their complaint therefore fails to satisfy *Iqbal*.

2. In addition, the allegations of the complaint are too vague and conclusory to support a claim that Secretary Rumsfeld violated plaintiffs' clearly established rights. Plaintiffs do not even attempt to relate two important aspects of their claim – the alleged threats of excessive force and the alleged withholding of medical care –

to any policy issued by Secretary Rumsfeld. Nor do plaintiffs relate any aspect of their actual interrogations to any such policy.

With respect to plaintiffs' other allegations concerning their treatment, they ask the Court to fill in the gaps, interpreting their complaint as alleging that the cells were kept cold at all times and that the conditions they allege existed "throughout their detentions" (Pl. Br. 54-55). However, as we demonstrated in our opening brief, plaintiffs – despite having first-hand knowledge of the facts – fail to provide sufficient detail or context that would make it possible to determine whether the actual conditions or conduct, as distinguished from the words they use to characterize it, shock the conscience. Given the difficulty in determining the precise contours of substantive due process as applied to the detention of individuals in a foreign war zone, plaintiffs' allegations are insufficient to adequately allege that Secretary Rumsfeld violated their clearly established constitutional rights.

III. THE DISTRICT COURT ERRED IN REFUSING TO DISMISS THE ACTION AGAINST THE UNITED STATES UNDER THE "MILITARY AUTHORITY" EXCEPTION TO THE ADMINISTRATIVE PROCEDURE ACT.

The "military authority" exception to the APA reflects the reality that waging war is both difficult and destructive. During military activities, property may be seized, destroyed, or lost simply as part of the exigency of battle. Allowing

individuals to engage in protracted litigation to require military officials to search for and find lost property would seriously hamper military effectiveness by taking military personnel away from the duties they were trained to perform.

Plaintiffs nonetheless press an argument that, if adopted, would open the door to APA suits for any party who seeks the return of property seized during military activities. Even though military officials returned all of plaintiffs' property they could find (Vance's laptop computer), and even though plaintiffs never sought to use an available administrative remedy,[5] plaintiffs insist that they may sue to force military officials to take additional, court-mandated efforts to locate and return the property seized when they were detained.

As we demonstrated in our opening brief, application of the plain language of the statute is enough to dispose of plaintiffs' APA claim. The military authority exception excludes from judicial review acts of "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G). In seeking the return of their personal property, plaintiffs challenge actions taken by "military

[5] The Military Claims Act provides a comprehensive process for resolving claims against the United States asserting, among other things, "damage to or loss or destruction of property" resulting from the activity of military personnel (including overseas). *See* 10 U.S.C. §§ 2731-2739. Notably, that statute unequivocally forbids judicial review of any agency decision. S*ee* 10 U.S.C. § 2735.

authority" (U.S. personnel who rescued plaintiffs and investigated the suspected arms smuggling), "in the field" (in Iraq), and that took place "in time of war."

Plaintiffs nonetheless argue that the military authority exception does not apply because they do not challenge the seizure itself, but merely the failure to return the seized property. But plaintiffs never address the fundamental flaw in this line of reasoning: focusing on the supposed failure to return the property will not, as plaintiffs assert, negate the need to inquire into the exercise of military authority in time of war. A court will inevitably have to inquire into the circumstances of the seizure of property, where and how it was stored, to whom it was transferred, and whether military officials lost or misplaced it.

Neither plaintiffs nor the district court have offered a principled basis for determining at what point the retention of seized property changes from military action during time of war into something else. Indeed, if plaintiffs' rigid distinction between seizure and return were correct, a claimant presumably could seek a judicial order of return the day after the seizure of property.

Plaintiffs attempt to minimize the potential for disruption by asserting that their complaint merely seeks "return of their property to the extent that it was no longer being held by the military in the 'field in a time of war.'" Pl. Br. 56 (quoting 5 U.S.C. § 701(b)(1)(G)). See Pl. Br. 15 (saying "[t]hey only seek return of property that is no

longer being held in the field of battle"). But plaintiffs' complaint was not so limited. Plaintiffs asserted that their property was "taken by United States officials in violation of the United States Constitution" (App. 147), and sought an order requiring "the return of *all* of Plaintiffs' personal property including computers, other electronics, and the data included therein." App. 148 (emphasis added).

Moreover, plaintiffs' contention that their claim merely involves a request for property that is no longer in Iraq rings hollow in light of the discovery requests they made in conjunction with their APA claim. Plaintiffs sought to compel the United States (which is a defendant only on the APA claim) to produce every document in the United States' possession, custody, or control that pertains to the identities of supervisory-level individuals who were "responsible for" or "set the policies and practices" concerning "the manner in which Plaintiffs were interrogated," "the manner in which the Detainee Status Review Board was conducted," and "the conditions at the Camp Cropper detention facility in which Plaintiffs were housed." *See* Dkt. 205, Plaintiffs' Motion to Compel, Feb. 26, 2010, at 2.

It may well be that these discovery requests (having little to do with lost property) were merely pretexts for plaintiffs to pursue their *Bivens* claims. But whatever plaintiffs' motive, the fact remains that the suggestion that the APA claim

here is a simple matter of locating and returning property in the United States, without disruption or involvement of military officials overseas, is incorrect.

Indeed, plaintiffs never come to grips with the inevitable result of their argument. If plaintiffs are correct, any litigant can, simply through artful pleading, negate the military authority exception and require extensive discovery into the chain of custody of property seized by military officials in a combat zone in time of war.[6] The suggestion that this inquiry can be undertaken without reference to the context in which the material was seized is, quite simply, fanciful.

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[6] Plaintiffs' suggestion (Br. 57) that their "own investigation" indicates that some of their property "was transferred far away from the field" provides no basis for rejecting the plain application of the military authority exception. As we discussed in the district court (Dkt. 131, at 5-6, 9-11), plaintiffs' contention that some of their property was moved to the United States is refuted by the very documents they cite (which show only that some paperwork, and not property, was transferred). And plaintiffs' suggestion that the participation of DOJ attorneys in *returning* Vance's laptop computer as part of this litigation somehow demonstrates that other property has been transferred to the United States is particularly disingenuous. Plaintiffs ignore the fact that Vance's laptop was discovered during a search of an Army Criminal Investigative Command evidence facility at Camp Victory in Iraq, and then sent to the U.S. so that it could be returned to him. *See* App. 157.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgments of the district court denying the motions to dismiss filed by Secretary Rumsfeld and by the United States should be reversed.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

I hereby certify that the Reply Brief for Appellant complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 6848 words.

December 29, 2010
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